

STATE OF ALASKA

FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

IBLA 92-277, 92-441

Decided July 12, 1993

Appeals from a decision of the State Director, Alaska, Bureau of Land Management, denying protest of proposed official filing of survey. U.S. Survey No. 9630, Alaska.

Reversed.

1. Alaska: Indian and Native Affairs--Boundaries--Indians: Lands: Generally--Surveys of Public Lands: Generally

When surveying the boundaries of an Indian reservation created in 1891 on an island off the coast of Alaska, it was not proper to include an island in the reservation that clearly was not included as the reservation was defined by the President in 1916.

APPEARANCES: Gary I. Amendola, Esq., Office of the Attorney General, State of Alaska, Juneau, Alaska, for the State of Alaska; Robert A. Maynard, Esq., Office of the General Counsel, Forest Service, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Marsha Kostura, Esq., Washington, D.C., for the Metlakatla Indian Community; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska and the Forest Service, U.S. Department of Agriculture, have appealed from a January 23, 1992, decision of the State Director, Alaska, Bureau of Land Management (BLM), denying a State protest against the official filing of a survey of the "Annette Islands Indian Reservation" (U.S. Survey No. 9630, Alaska). At issue is whether "Warburton Island," situated off the western shore of Annette Island in Nichols Passage, in unsurveyed T. 78 S., R. 91 E., Copper River Meridian, Alaska, was properly included in the reservation, and whether the surveyors were correct in using the baseline method to establish the boundaries of the reservation.

Pursuant to section 15 of the Act of March 3, 1891, 25 U.S.C. § 495 (1988), Congress set apart the body of lands known as the Annette Islands

as a reservation for the use of the Metlakahtla Indians, now referred to as the Metlakatla Indian Community (Community), who have participated in this appeal. The Annette Islands were described in the Act as "situated in Alexander Archipelago in Southeastern Alaska on the north side of Dixon's entrance." The "Annette * * * Islands" were excluded from the Tongass National Forest when it was enlarged in 1909. See 35 Stat. 2226, 2228 (1907-09).

In 1918, the Supreme Court found that the reservation included all of the uplands that make up the Annette Islands (described as a group of small islands), as well as intervening and surrounding waters and submerged lands. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87, 89 (1918). The Court, however, did not define the geographic extent to which the reservation created by Congress encompassed such waters and submerged lands. That action was accomplished by President Wilson in Proclamation No. 1332 (39 Stat. 1777 (1915-17)), issued on April 28, 1916. Metlakatla Indian Community v. Egan, 369 U.S. 45, 54, 56 (1962). The proclamation established the "Annette Island Fishery Reserve," that reserved the fishery in certain waters surrounding the "Annette Islands" for the benefit of the Metlakahtla Indians (39 Stat. 1777 (1915-17)). Those waters were described as "the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation." Following the proclamation, the Metlakatla Reservation included the waters within the outer boundary of the reserve, i.e., the line 3,000 feet of "Annette and adjacent islands." Metlakatla Indian Community v. Egan, supra at 54.

Exactly what was included in the Annette Islands Indian Reservation has been the subject of some dispute in recent years, especially as a result of a continuing effort by the State, Community, and Bureau of Indian Affairs (BIA) to delineate the boundary between State and reservation waters for the benefit of Community and non-Community fishermen. Since April 1988, BLM has, at the request of BIA, sought to resolve the dispute by surveying the boundaries of the reservation.

Special Instructions were issued by the Deputy State Director for Cadastral Survey, Alaska, BLM, on March 18, 1988, instructing Cadastral Survey to determine the seaward boundary line 3,000 feet from the mean low tide line of "Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets." Id. at 1. At that time, Cadastral Survey apparently did not regard Warburton Island as part of the reservation since it was then included in the Tongass National Forest. See Attachment to Letter from Deputy State Director for Cadastral Survey, to Area Director, BIA, dated May 2, 1988, at 2. Questions were raised by the Community and BIA regarding whether Warburton Island should be included in the reservation, since the waters adjacent to it were a significant source of salmon and would not be reserved to the Community unless the island were to be part of the reservation. The island

and adjacent waters had long been regarded as part of the reservation by the Indians.

The Community requested inclusion of the island in the survey of the reservation by letter to BIA, dated June 28, 1988. In turn, BIA informed BLM by letter dated April 13, 1989, that it likewise regarded the island as part of the reservation. A formal opinion was obtained from the Regional Solicitor, Pacific Northwest Region, on April 23, 1991. After a lengthy exegesis, he concluded that Congress intended to include Warburton Island in the reservation because it was "known" to be part of the "Annette Islands," within the meaning of the 1891 Act. See Memorandum to BIA from Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 21. That opinion was concurred in by the Office of the Regional Solicitor, Alaska Region, on April 29, 1991.

On May 22, 1991, the Chief, Branch of Survey Preparation and Contracts, Alaska, BLM, issued Amended Special Instructions for survey of the Indian reservation. Cadastral Survey was instructed to determine the seaward boundary line measuring 3,000 feet not only from the islands named in the 1916 proclamation, but also from "Warburton Island." The survey was completed May 1991. It was accepted by the Deputy State Director for Cadastral Survey on August 22, 1991.

On October 15, 1991, BLM published in the Federal Register a notice of the proposed official filing of the plats for U.S. Survey No. 9630, Alaska. 56 FR 51727 (Oct. 15, 1991). The notice provided an opportunity to file protests objecting to the proposed filing before the official filing date of November 14, 1991. The State filed a protest challenging the proposed filing on November 13, 1991. No protest was filed by the Forest Service. Under the terms of the Federal Register notice, the filing of the survey plats was stayed until final administrative resolution of the protest. In his January 1992 decision, the State Director denied the State's protest, addressing each of the arguments raised by the State. Both the State (IBLA 92-277) and the Forest Service (IBLA 92-441) appealed timely.

The Community and BLM have requested the Board to dismiss the Forest Service appeal as untimely filed. BLM has also filed a motion to dismiss the Forest Service appeal for lack of standing to appeal under 43 CFR 4.410(a). BLM argues that the Forest Service cannot be considered a "party to [the] case," within the meaning of that regulation, because it did not protest the proposed filing before appealing. The Community has joined in BLM's motion to dismiss.

Standing to appeal from a BLM decision is founded in part on an appellant being a "party to [the] case" under 43 CFR 4.410(a). See Storm Master Owners, 103 IBLA 162, 177 (1988). This generally means that the appellant has participated in the decisionmaking process which led up to the decision on appeal (by filing a protest or otherwise). See Stanley Energy, Inc., 122 IBLA 118, 120 (1992). The purpose of this requirement is to ensure that BLM has already considered the impact of its decision on the appellant, thus promoting the proper use of administrative resources.

See California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977). The Forest Service did not protest the proposed official filing of the Annette Islands survey or otherwise join in the State's protest, despite having been duly notified of the proposed filing by publication in the Federal Register (56 FR 51727 (Oct. 15, 1991)). See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). The record shows that the Forest Service was also not directly involved in the decisionmaking process which led up to the inclusion of Warburton Island in the proposed BLM survey of the reservation. On the record before us, therefore, it appears that the Forest Service lacks standing to appear as a party to the appeal. Edwin H. Marston, 103 IBLA 40 (1988).

Nonetheless, the Forest Service is clearly interested in the substance of this appeal and will be directly affected by our decision inasmuch as the island that is the subject of dispute will be subject to administration by the Forest Service if it is not included in the reservation. It is therefore appropriate to allow the Forest Service to participate as an amicus. The statement of reasons (SOR) filed by the Forest Service will therefore be considered on the same basis as that received from the Community. Nor can we discern any prejudice to the Community in proceeding in this fashion with the appeals. In order to aid the Board in determining whether to decide the case, remand it to BLM, or refer it for a hearing, the Community has been free to present any arguments and evidence in opposition to the Forest Service claim concerning the accuracy of the 1916 diagram.

BLM, joined by the Community, has requested the Board to summarily affirm the State Director's January 1992 decision because the State has failed to affirmatively assert any reason why the decision on appeal is in error, but rather merely reiterated the arguments advanced below. The State opposes the motion. We have held that failure to state why a BLM decision denying a protest to a proposed BLM action is in error will be treated as fatal to the appeal. See Burton A. McGregor, 119 IBLA 95, 98 (1991), and cases cited therein. The remedy in such circumstances is generally to dismiss the appeal for failure to file an adequate SOR, or the Board may summarily affirm the BLM decision. In Re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991). The reason for either action is that the appeal does not provide any basis for the Board to determine whether the BLM decision (that is then subject to Board review), as opposed to the underlying BLM action, was wrongly decided.

We do not disagree that the State's SOR does not deviate in any significant respect from its protest. While this approach fails to address the State Director's specific responses to the protest arguments in his decision, we cannot say that the SOR is inadequate in this case. Rather, it provides an adequate basis for the Board to determine whether BLM should have included Warburton Island in the reservation and thus to decide whether the protest was wrongly denied. Accordingly, the motions to summarily affirm the State Director's January 1992 decision are denied. We will decide this appeal on the merits.

[1] BLM argues first that, because it is ambiguous, the statutory language creating the Annette Islands Indian Reservation should be construed liberally, with doubtful expressions resolved in favor of the Indians, under a longstanding doctrine of statutory construction. The State and Forest Service do not dispute the general application of this doctrine. Further, BLM is correct that the doctrine is properly applied when Congress has conveyed land to Indians. See Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). Moreover, section 15 of the Act of March 3, 1891, would seem proper for application of the doctrine since it is unclear what Congress meant to include in the reservation of the "Annette Islands." Therefore, such ambiguity should be resolved in favor of the Indian beneficiaries of the Act. See Alaska Pacific Fisheries v. United States, *supra* at 89. Nothing in the doctrine itself, however, aids the resolution of the alleged ambiguity in the 1891 Act, *i.e.*, the meaning of the "Annette Islands." Nor does it allow us to specifically conclude, as BLM and the Community would have us do, that Warburton Island should be declared to be part of the "Annette Islands."

The State purports to find a basis for the exclusion of Warburton Island from the reservation in the fact that the island is not expressly included in the reservation in either the 1891 Act or the April 1916 proclamation. We are not persuaded by this argument. It has also been said that Warburton Island should not be included in the Indian reservation because a February 13, 1921, Executive Order (No. 3406) reserving the island for lighthouse purposes indicates that the United States did not regard the island as part of the reservation. We attribute little significance to this action since it was accomplished "subject to any existing valid rights." Consequently, it was not necessarily inconsistent with inclusion of the island in the Indian reservation. See Memorandum to BIA from the Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 2.

The islands included in the 1891 reservation were simply identified collectively as the "Annette Islands." 25 U.S.C. § 495 (1988). No significance can therefore be attached to the fact that Warburton Island is not referred to in the 1891 Act. By contrast, the 1916 proclamation did refer to specific islands, but makes no mention of Warburton Island. We might attribute the President's failure to expressly include the island in the reservation to a desire to exclude it since we cannot attribute that failure to any other reason. His failure to include the island was not owed to the fact that the island was unnamed. Warburton Island was named at the time of the proclamation. Indeed, it had been named in 1883. See Donald J. Orth, Dictionary of Alaska Place Names, 1028 (Geological Survey Professional Paper 567 (1971) (Orth)).

Having said that, we do not regard the list of islands in the 1916 proclamation to be exhaustive. As the Supreme Court said in Metlakatla Indian Community v. Egan, *supra* at 49, the proclamation only referred to "certain of the[] [Annette] [I]slands." (Emphasis added.) The remainder of the "Annette Islands" (although unnamed in the proclamation) are also included in the reservation. The diagram attached to the proclamation includes other islands named in 1883 (Pow, Gull, Scrub, and Murdo) in the

reservation. See Orth at 396, 666, 775-76, 846. We therefore can attach no significance to the fact that Warburton Island is not referred to in the 1916 proclamation.

Nevertheless, we can say that evidence that Warburton Island was intended to be included in the reservation is not to be found in the fact that it qualifies as an "islet" that is "adjacent" to Annette Island or any of the other islands named in the 1916 proclamation (within the meaning of that proclamation), since it does not. While those terms are not defined in the proclamation or elsewhere, Warburton Island has long been referred to as an island. It cannot be considered an "islet." In addition, as the Forest Service correctly points out, Warburton Island is further from Annette Island than certain of the islands shown to be excluded from the reservation on the 1916 diagram, such as Bold and Hotspur. See Forest Service SOR at 6; Attachment B to Exh. 1 attached to Forest Service SOR at 1, 3, 5. This is directly contrary to the statement in the State Director's January 1992 decision, at page 3, that Warburton Island is located "in closer proximity to the group of islands clearly recognized as the Annette Islands than any other * * * islands." See also Memorandum to BIA from the Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 8 ("[Warburton Island] is far closer to Annette Island than any other island"). We do not, therefore, consider Warburton Island "adjacent" to Annette Island or any of the other islands named in the 1916 proclamation.

The parties discuss at some length the significance of the diagram attached to the 1916 Presidential proclamation in solving the mystery of whether Warburton Island was intended to be included in the reservation. The State and Forest Service contend that the diagram clearly excludes the island from the reservation. BLM and the Community disagree, arguing that it provides an insufficient basis upon which to draw a conclusion, but that it could just as likely support inclusion of the island in the reservation.

The diagram makes no reference to Warburton Island by name. At best, it depicts two islets and/or rocks just west of Annette Island relatively near where Warburton Island is to be found. No other island, islet, or rock is depicted anywhere west of these islets and/or rocks. The number of islets and/or rocks shown and their close proximity to Annette Island indicates that they are not Warburton Island. That island is a solitary island with no associated islets or rocks and is situated over 1-1/2 miles from Annette Island. See Attachment B to Exh. 1 attached to Forest Service SOR at 3. Also, the two islets and/or rocks are depicted on the diagram as situated at the outer edge of the mean low tide line of Annette Island. There is nothing in the record indicating that Warburton Island is at the edge of that tide line. Indeed, that is unlikely given that the island is more than a mile out into the Nichols Passage.

By contrast, the record indicates that there is a reef, with one or two exposed rocks or islets, very close to the shore of Annette Island in that area. A current Geological Survey (Survey) topographic map of the Annette Island area (Ketchikan (A-5), Alaska (1955, updated 1962)) shows

one exposed rock or islet. See Attachment B to Exh. 1 attached to Forest Service SOR at 3. Moreover, the 1991 survey plat shows two exposed rocks or islets. These rocks or islets could be the two rocks or islets depicted on the 1916 diagram. Overall, the relative accuracy of the diagram with respect to the placement of islets and rocks is attested to by the fact that it properly depicts Pow Island and the islets or rocks near Annette, Reef, and Direst points and in Port Chester and Canoe Cove.

It is clear, therefore, that the 1916 diagram fails to depict Warburton Island within the seaward boundary line of the reservation. This indicates that the island is situated outside that line. We might be wary to attribute too much importance to this failure to depict the island since the diagram otherwise shows other named islands that are excluded from the reservation, viz., Bold, Revillagigedo, Gravina, Percy, Hotspur, Duke, Dog, Cat, and Mary Islands. Warburton Island is, however, considerably smaller than these other islands. Further, it is situated farther from the coast of Annette Island, which, together with its small size, explains the failure to include the island on the diagram. David I. Wood, a Forest Service surveyor, notes that the island is situated considerably more than 3,000 feet west from the nearest islet or rock off the coast of Annette Island. The distance to Warburton is 5,700 feet from the nearest islet or rock.

Moreover, the Forest Service has provided evidence that the diagram was drawn reasonably accurately to scale and, as such, places Warburton Island outside the reservation. In his June 1992 declaration, Wood states that, by comparing the 1916 diagram with the 1955 Survey topographic map and a current National Oceanic and Atmospheric Administration (NOAA) nautical chart of that area, he determined that the diagram was drawn reasonably accurately to scale (Wood Declaration at 1-2). He asserted that the scale was about 1 inch: 16,428 feet. Using this scale and the known location of Warburton Island in relation to the western coast of Annette Island, Wood was able to place that island on the 1916 diagram in relation to the boundary line of the reservation. In this way, he determined that the island was 3,000 feet west from the closest point on the boundary line, and thus beyond it. BLM and the Community have not rebutted this evidence.

Other conclusions can also be drawn from the 1916 diagram regarding the rationale for inclusion of nearby islands. Excluded from the reservation were a number of named islands (Bold, Revillagigedo, Gravina, Percy, Hotspur, Duke, Dog, Cat, and Mary), which are situated in relatively close proximity to Annette Island. These islands could just as likely have been included in the reservation. But the reason for their exclusion becomes clear when the reason is given for inclusion in the proclamation of the named islands (Ham, Walker, Lewis, Spire, and Hemlock). Each of the included islands is either within 3,000 feet of Annette Island (Ham, Spire, and Hemlock) or within 3,000 feet of any island situated within that limit (Lewis and Walker). This is not true of the excluded islands. This approach, whereby once islands are included within the territorial limits of the reservation they serve to extend those limits further out into the surrounding waters thus encompassing other islands, is consistent

with a recognized standard for determining the limits of a territorial sea adjacent to a body of land. See 2 Aaron L. Shalowitz, Shore and Sea Boundaries, 379, 380 (Figure 93, Example "A") (Publication 10-1, U.S. Department of Commerce (1964)) (Shalowitz). The territorial sea (or "maritime belt") is "that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens." Louisiana v. Mississippi, 202 U.S. 1, 52 (1906). As such, it is akin to the belt of open water surrounding the "Annette Islands" set aside as a fishery reserve in 1916.

Using the standard described by Shalowitz, off-shore islands (as well as rocks and islets) found within the territorial sea limits of a body of land serve to extend those limits further out into surrounding waters, thus encompassing other islands. This was the survey approach initially advocated by the Community (see Memorandum to State of Alaska and BIA, dated Sept. 17, 1987, attached to Oct. 9, 1987, letter to BLM (Sept. 1987 Memorandum), at 9-12) and adopted by BLM (see Amended Special Instructions, dated May 14, 1991, at 2; Attachment to Memorandum, dated Feb. 25, 1992, from Acting Chief, Branch of Mapping Sciences, Alaska, BLM, to Chief, Branch of Examination and Records, Alaska, BLM, at 2) in deciding whether to include other islands (with the exception of Warburton), along with islets and rocks, in the reservation. The Regional Solicitor, Pacific Northwest Region, endorsed this approach, stating that "BLM's use of accepted surveying principles [for surveying marine boundaries] to implement the language of the Proclamation is the proper method by which to locate the boundary of the fishery reserve" (Memorandum to BIA, dated Apr. 23, 1991, at 12).

The method was not used by BLM, however, in the case of Warburton Island because it would have excluded that island from the reservation since the island is admittedly not within 3,000 feet of Annette Island (or any other island, islet or rock within 3,000 feet of Annette Island). See September 1987 Memorandum at 14, 16. To include Warburton Island required BLM to create a substantial westward bulge in the seaward boundary of the reservation, as depicted on the survey plats. This evidence establishes that Warburton Island is not one of the islets and/or rocks depicted in the 1916 diagram. Moreover, it proves that the island is beyond the boundary line of the Indian reservation, as it is drawn 3,000 feet from the mean low tide line of any island, islet, or rock included in the reservation.

The State challenges the method used by BLM in surveying the boundary of the reservation. The State argues that use of this method has resulted in an "expansive boundary" by allowing all islands, rocks, and islets within 3,000 feet of the mean low tide line of Annette and the other named islands to extend even further the boundary of the reservation, contrary to the 1916 proclamation (State SOR at 8). Except in the case of Warburton Island, the BLM survey located the boundary line of the reservation 3,000 feet seaward from the mean low tide line of Annette Island and the other named islands, as well as all "adjacent rocks and islets," which

were considered to be those within the original 3,000-foot limit. See Attachment to Memorandum, dated Feb. 25, 1992, from Acting Chief, Branch of Mapping Sciences, Alaska, BLM, to Chief, Branch of Examination and Records, Alaska, BLM, at 1, 2. In this way, BLM used international survey rules, accepted by the United States, for locating the boundary of a territorial sea. See 1 Shalowitz, 28, 225; 2 Shalowitz, 379, 380.

We find no error in BLM's methodology. We conclude that BLM's method is consistent with the 1916 proclamation since it is clear that the proclamation itself relied on the same method. The proclamation provided for placing the boundary line 3,000 feet seaward from the mean low tide line of certain named islands. The only apparent basis for inclusion of Lewis and Walker islands in that list was that they were intersected by a boundary line drawn 3,000 feet from the mean low tide line of Ham Island, which was itself within 3,000 feet from the mean low tide line of Annette Island. That this was the approach generally taken by the United States in 1891 and thereafter is evident in a May 28, 1886, letter from Secretary of State Bayard to Secretary of the Treasury Manning, quoted by Shalowitz at page 29: "[T]he seaward boundary of th[e] zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt." See also id. at 342 ("That each offshore island should have its own [maritime] belt goes naturally with the fact that these islands are part of the territory of the nation to which the mainland belongs. * * * [T]he rule * * * has traditionally been the position of the United States in international relations"). We believe that the proclamation similarly intended that this longstanding rule be operative to define those "adjacent rocks and islets" from which an additional 3,000 feet was to be measured in this case.

The argument for deviating from the standard method, advanced by the Community and recently adopted by BLM for Warburton Island alone, is that, at the time the reservation was established and thereafter, the Metlakahtla Indians used Warburton Island and regarded it as part of the reservation. Accordingly, the island was "known" to be part of the "Annette Islands," within the meaning of the Act of March 3, 1891. 25 U.S.C. § 495 (1988). The record contains affidavits by Metlakahtla Indians attesting to personal use of Warburton Island and surrounding waters for subsistence purposes and the fact that the island has, since it was first settled by the Indians, been regarded as part of their reservation. See Exh. 3 attached to Forest Service SOR at 1-6. None of these individuals was alive at the time of the 1891 Act. Some were either children or youths (ranging in age from 4 to 22) at the time of the 1916 proclamation and were presumably aware of whether the Indians regarded Warburton Island as part of their reservation. We do not dispute their competency to attest to that belief. Nonetheless, we do not find that this evidence shows the island was generally "known" to be part of the "Annette Islands" in 1891 and was so regarded by Congress when it enacted the 1891 Act (let alone by President Wilson when he issued his 1916 proclamation). Compare with Pearcy v. Stranahan, 205 U.S. 257, 266 (1907). Nor are we persuaded that Congress in 1891 regarded Warburton Island as "known" to be part of the "Annette Islands" because many years later the Army believed during the Second World War that it

needed the permission of the Indians to locate a lookout facility on the island or, in more recent times, the Forest Service has never taken any management action with respect to the island. See Memorandum to BIA from the Regional Solicitor, Pacific Northwest Region, dated Apr. 23, 1991, at 21.

Mention is also made of a February 5, 1890, letter from Father William Duncan, a Christian missionary who was instrumental in persuading Congress to establish the reservation (see 21 Cong. Rec. 10,092 (1890)), to his legal counsel. In that letter, he stated that "three or four little islets on the bay and a small island in close proximity to the main island" should be included in the reservation. There is nothing to indicate that Father Duncan was referring to Warburton Island. The Forest Service also argues persuasively that he was likely not referring to that island since it is comparable in size to the "islets" in the bay to which he was also likely referring, *i.e.*, Gull, Scrub, and Murdo. See Forest Service SOR at 8. Rather, it is more likely that he was referring to Hemlock Island, which is situated in closer proximity to the main island and is significantly greater in size than the "islets." In any case, there is no evidence that the "small island" mentioned by Father Duncan (even if it was Warburton) was subsequently included in the reservation by Congress. There is no proof that Congress, in enacting the Act of March 3, 1891 (or President Wilson, in proclaiming the boundaries of the reservation in 1916), was aware of the 1890 Duncan letter. Therefore, we cannot conclude that Duncan's letter indicates that Congress saw Warburton Island as part of the "body of lands known as Annette Islands." 25 U.S.C. § 495 (1988).

We therefore conclude that the State Director improperly denied the State's protest to the proposed official filing of U.S. Survey No. 9630, Alaska, because BLM had improperly surveyed the boundaries of the Annette Islands Indian Reservation so as to include Warburton Island. That island should now be deleted from the survey. Otherwise, we find no error in the survey.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

Were the question as to the status of Warburton Island to be decided as an initial matter by this Board, unconstrained by certain principles of adjudicatory interpretation and appellate practice (which I examine below), I believe that the position of the majority, viz. that Warburton island is not part of the Annette Island Reserve, 1/ could be sustained. Unfortunately, I believe the factual questions are sufficiently close that, when considerations of burden of proof analysis and the rule that ambiguities in language affecting grants to Indians are to be construed favorably to the Indians are brought to bear, they are sufficient to tilt the balance in the opposite direction. Thus, I must dissent from the majority's determination that the decision below should be reversed.

I approach this case under the following analysis. First of all, as we have said countless times, decisions of the Bureau of Land Management (BLM) are presumptively valid, and accordingly, any appellant has the affirmative burden of establishing error in the decision being appealed by a preponderance of the evidence. See, e.g., In re Pacific Coast Molybdenum, 75 IBLA 16, 22, 90 I.D. 352, 355-56 (1983). Secondly, as even the majority agrees, this appeal properly invokes the recognized rule of construction that ambiguities in grants to Indians should be resolved on the Indian's behalf. It seems to me, therefore, that, consistent with the foregoing principles, in order to succeed in its appeal the State must show, by a preponderance of the evidence, that there is no ambiguity with respect to the status of Warburton island. I simply do not believe that it has carried this burden.

I reach this conclusion despite my agreement with the majority that a number of contentions of BLM and the Metlakatla Community are properly rejected. Thus, for example, I do not find any sustenance for BLM's position in the letter from Father Duncan. I agree with the majority that there is no indication that this letter was ever conveyed to any member of Congress and that, in any event, it is far more likely that the island which he referenced was Hemlock Island rather than the considerably smaller and more distant Warburton Island.

Similarly, I am not greatly impressed with the affidavits submitted for the purpose of establishing that the Metlakatla Community always considered Warburton Island to be within the Annette Island Reserve. The real question is whether or not the term "Annette Islands" was generally thought of as including Warburton Island at the time Congress adopted section 15 of the Act of March 3, 1891, 25 U.S.C. §495 (1988), and when President Wilson

1/ The Supreme Court referred to this reserve as the "Metlakatla Reserve" in its decision styled Metlakatla Indians v. Egan, 369 U.S. 45 (1962). However, in adopting section 19(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1618(a) (1988), Congress used the term "Annette Island Reserve," which practice has been followed in the text of this dissent.

issued Proclamation No. 1332 on April 28, 1916. See 39 Stat. 1777. The reliance which BLM and the Metlakatla Community place on the principle that uncertain language in treaties are interpreted as the Indians would have understood them is, I would suggest, totally misplaced.

The relevance of the Indian interpretations of treaty language is that, since the treaty language was presumably the result of negotiations between the Indians and the United States Government, the United States should be bound, out of fairness to what were then considered to be dependent populations, to interpret the provisions as the Indians would have understood them. See Antoine v. Washington, 420 U.S. 194, 197 (1974); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). This principle should have no application in the instant case since the 1891 Act was not the outgrowth of any negotiations between arguably sovereign entities but rather was an act of grace by Congress to permit non-Native Indians to reside, unmolested, on the lands upon which they had settled. See generally Metlakatla Indians v. Egan, 369 U.S. 45 (1962).

The core issue of this appeal, in my opinion, turns on the question as to the effect of the diagram which accompanied the 1916 Presidential Proclamation and the inferences which can fairly be drawn from it. At the outset, I think that BLM's attempt to belittle the importance of this diagram as merely a "sketch" misses the point. The diagram is, by the express terms of the proclamation, made a part of it. In this regard, it is no different that a metes and bounds description of land in a withdrawal that fails to obtain the limits of closure. While obviously such a description could not literally be followed, clearly the description would be of importance in determining the actual parameters of the withdrawal. Similarly, while the diagram herein cannot be given conclusive weight, I agree with the majority that the diagram must be accorded considerable importance in determining the extent of the Annette Island Reserve.

Notwithstanding the foregoing, however, there are two arguments which do provide some support for the conclusion that Warburton Island is properly deemed to be part of the "Annette Islands." First of all, the 1891 Act did refer to the "Annette Islands." (Emphasis added.) Obviously, this means that a group of islands were intended to be set aside for the Metlakatla Community. The question is, which ones?

I believe that the starting point of any analysis of the scope of the 1891 Act should be the Presidential Proclamation of 1916, which could be read as the initial administrative interpretation of the meaning of the term "Annette Islands." The proclamation expressly refers to Annette, Ham, Walker, Lewis, Spire and Hemlock Islands as part of the "Annette Islands." By definition, therefore, these islands would clearly be considered part of the Annette Islands. The foregoing cannot be considered a definitive list, however, since it omits three other named islands (Pow, Gull, and Snipe) and numerous small unnamed islands and islets, which all parties concede are part of the Annette islands.

The majority attempts to develop a rationale for including these islands and excluding Warburton island by arguing that all of the islands properly included are either within 3,000 feet of Annette island or within 3,000 feet of an island located within that limit. Supra at 7. Unfortunately for this hypothesis, an analysis of the survey maps submitted with the appeal indicates that the distance from Ham Island to Walker Island, even at mean low tide, is approximately 50 chains, i.e., 3,300 feet. Thus, the inclusion of Walker Island in the list of islands constituting the Annette Islands in the Presidential Proclamation cannot be justified on the theory of the majority. 2/

Moreover, I think that the majority clearly misinterprets an argument made by BLM and the Metlakatla Community, which argument, if correctly understood, does tend to support the inclusion of Warburton Island as part of the Annette Islands. Thus, the majority decision recounts that the State Director's decision had stated that "Warburton Island is located 'in closer proximity to the group of islands clearly recognized as the Annette Islands than any other * * * islands.'" Supra at 6. The majority expressly rejects this statement, noting that "Warburton Island is further from Annette Island than certain of the islands shown to be excluded on the 1916 diagram, such as Bold and Hotspur." Id. In effect, the majority interprets the Director's decision as asserting that Warburton Island is in closer proximity than any other excluded island to Annette Island. That, however, is not what the Director meant. What the Director meant is that Warburton Island is closer to Annette than Warburton Island is to any other island. That statement is, in fact, true. Its relevance lies in the fact that this is probative of the question whether Warburton was generally considered part of the "Annette Islands" or was generally deemed part of another island grouping (as, for example, the many small islands southeast of Hotspur which are known as the Percy Islands). It seems to me that the relatively small size (5 acres) of Warburton together with the fact that it is far closer to Annette Island than it is to any other island, is supportive of BLM's argument that Warburton Island is properly considered to be part of the "Annette Islands" as that phrase was used in the 1891 Act.

The second point which argues in favor of BLM's decision relates to the diagram which accompanied the 1916 Presidential Proclamation. As the Metlakatla Community points out, the diagram shows two islands adjacent to the northwest corner of the southwestern peninsula in the general direction of Warburton Island's location. Admittedly, these depicted islands are significantly closer to the shore of Annette Island than is Warburton, but the Metlakatla Community argues that this could well be an unintentional misplating of the actual position of Warburton Island.

The majority examines this contention and rejects it. Supra at 6-7. The majority bases its rejections on two points. First, they note that a recent Geological Survey topographic map shows one exposed rock or islet

2/ Moreover, it should be noted that Walker Island is, in fact, considerably farther from Annette Island than is Warburton Island.

near the location of the two islands depicted on the 1916 diagram. Second, they point out that the orthophotographic survey shows two exposed rocks or islets. Thus, the majority suggests that the diagram actually depicts two islets rather than a misplaced Warburton Island.

The majority also argues that, since

[o]verall, the relative accuracy of the diagram with respect to the placement of islets and rocks is attested to by the fact that it properly depicts Pow Island and the islets or rocks near Annette, Reef, and Direst points and in Port Chester and Canoe Cove[,] *
* * [i]t is clear, therefore, that the 1916 diagram fails to depict Warburton Island within the seaward boundary line of the reservation.

While I would certainly agree that it is open to dispute whether the diagram depicts Warburton Island, I cannot agree with the assertion of the majority that it is clear that it does not depict Warburton Island.

First of all, the islands depicted on the Geological Survey topographic and the orthophotographic maps are not in the same position (being noticeably to the north) as the islands shown on the diagram. While it may be that this is the result of a misplatting of these islets on the original diagram it is just as likely that this could be the result of a misplatting of Warburton Island on the original diagram.

Moreover, the general accuracy of the 1916 diagram is clearly open to debate. Thus, I would suggest that, contrary to the majority's assertion, the diagram's depiction of Canoe Cove is not substantially accurate. Furthermore, the diagram clearly mislocates, by a considerable distance, Snipe Island on the southeast side of Annette Island. Finally, the bathographic depictions on Exhibit 13 in the Supplement to the Administrative Record filed by BLM do not support the existence of an island at the location shown on the orthophotographic plat, thereby undercutting the majority's reliance on this plat. ^{3/}

^{3/} I would suggest that this apparent contradiction is occasioned by the fact that "islands" are, by definition, normally considered fixed parcels of land above mean high tide (see, e.g., Article 10 of the Convention on the Territorial Sea and the Contiguous Zone), whereas the orthophotographic process in determining islands was supplemented by helicopter flights at low tide to determine the existence of islands for the purpose of establishing the seaward boundary of the Annette Islands. See Memorandum dated June 20, 1989, from Lead Photointerpreter to Chief, Branch of Photogrammetry. Thus, what might be considered an "island" for purposes of the orthophotographic mapping would not necessarily have been considered an island for other purposes, including the drawing of the 1916 diagram.

In my view, the status of Warburton Island is sufficiently ambiguous that an argument could be made either that it is part of the Annette Islands or that it is not part of the Annette Islands. But, given such an ambiguity, it seems to me that we have no choice but to affirm BLM since the State bears the affirmative burden of showing that Warburton Island is not part of the Annette Islands and we are required, as the majority readily admits, to construe any ambiguities in the 1891 Act and 1916 Presidential Proclamation in favor of the Metlakatla Community. Accordingly, I cannot agree with the majority's reversal of BLM's determination that Warburton Island is part of the Annette Islands. I must respectfully dissent.

James L. Burski
Administrative Judge